

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

OLYMPIC GAME FARM, INC., *et al.*,

Defendants.

CASE NO. 3:18-cv-06025-RSL

ORDER REGARDING PLAINTIFF'S  
*DAUBERT* MOTION

This matter comes before the Court on "Plaintiff's *Daubert* Motion." Dkt. # 158. Plaintiff seeks to exclude the testimony of Dr. Michael Briggs, a veterinarian, on relevance and/or *Daubert* grounds.<sup>1</sup> In particular, plaintiff objects to Dr. Briggs's testimony regarding:

- the pervasiveness of USDA citations for violations of the Animal Welfare Act ("AWA");
- the interpretation of necropsy tissue samples taken from Olympic Game Farm animals;
- the adequacy of defendants' animal care and veterinarian expenditures;

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<sup>1</sup> Defendants no longer intend to present the opinions or testimony of Dr. Ellie Armstrong, and the Court has therefore not considered plaintiff's objections thereto. *See* Dkt. # 274.

- 1       ▪ the societal value of Olympic Game Farm;
- 2       ▪ the relevant animal husbandry standards; and
- 3       ▪ underlying facts for which he has no personal knowledge and which are
- 4             contradicted by evidence in the record.

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6 Federal Rule of Evidence 702 provides that expert testimony is admissible if:

7       (1) the witness is sufficiently qualified as an expert by knowledge, skill,  
8       experience, training, or education; (2) the scientific, technical, or other  
9       specialized knowledge will help the trier of fact to understand the evidence  
10      or to determine a fact in issue; (3) the testimony is based on sufficient facts  
11      or data; (4) the testimony is the product of reliable principles and methods;  
12      and (5) the expert has reliably applied the relevant principles and methods to  
13      the facts of the case.

14      *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014). As construed  
15      in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Rule 702 tasks a district judge with  
16      “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to  
17      the task at hand.” 509 U.S. 579, 597 (1993). Scientific evidence is reliable when “the  
18      principles and methodology used by an expert are grounded in the methods of science.”  
19      *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003). When determining the  
20      reliability of scientific evidence, the Court can consider a list of non-exclusive factors,  
21      such as “whether the theory or technique employed by the expert is generally accepted in  
22      the scientific community;” “whether it’s been subjected to peer review and publication;”  
23      “whether it can be and has been tested;” and “whether the known or potential rate of error  
24      is acceptable.” *Hardeman v. Monsanto Co.*, 997 F.3d 941, 960 (9th Cir. 2021), *cert.*  
25      *denied*, 142 S. Ct. 2834 (2022) (citations omitted). But “[t]he inquiry envisioned by Rule  
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1 702 is ... a flexible one,” and where an expert offers non-scientific testimony, “reliability  
2 depends heavily on the knowledge and experience of the expert, rather than the  
3 methodology or theory behind” the testimony. *Porter v. Martinez*, 64 F.4th 1112, 1127  
4 (9th Cir. 2023) (quoting *Daubert*, 509 U.S. at 594, and *Hangerter v. Provident Life & Acc.*  
5 *Ins. Co.*, 373 F. 3d 998, 1017 (9th Cir. 2004)). The analysis “should be applied with a  
6 ‘liberal thrust’ favoring admission.” *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193,  
7 1196 (9th Cir. 2014) (quoting *Daubert*, 509 U.S. at 588).

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10 Ultimately, the test under *Daubert* is not the correctness of the expert’s  
11 conclusions but the soundness of his methodology. The court is a gatekeeper,  
12 not a fact finder. Accordingly, the district court is not tasked with deciding  
13 whether the expert is right or wrong, just whether his testimony has  
14 substance such that it would be helpful to a jury. If the proposed testimony  
15 meets the thresholds of relevance and reliability, its proponent is entitled to  
16 have the jury decide upon its credibility, rather than the judge. Challenges  
17 that go to the weight of the evidence are within the province of a fact finder,  
not a trial court judge. A district court should not make credibility  
determinations that are reserved for the jury. This Court has previously noted  
that shaky but admissible evidence is to be attacked by cross examination,  
contrary evidence, and attention to the burden of proof, not exclusion.

18 *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022) (internal quotation  
19 marks, citations, and alterations omitted). “Basically, the judge is supposed to screen the  
20 jury from unreliable nonsense opinions, but not exclude opinions merely because they are  
21 impeachable.” *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–70  
22 (9th Cir. 2013).

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24 **A. Pervasiveness of USDA citations for violations of the AWA**  
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1 Dr. Briggs intends to testify that, based on his experience, training, education, and  
2 expertise, he is “unaware of any zoo or animal-holding facility—whether AZA-accredited  
3 or not—that has not had at least one or two [AWA] infractions that needed to be resolved.”  
4 Dkt. # 174 at 22. Dr. Briggs has worked in the zoo industry as a veterinarian, researcher,  
5 consultant, and general curator for more than 35 years. His specialized knowledge and  
6 experience can serve as the requisite “facts or data” on which he renders an opinion under  
7 Rule 702. *Elosu*, 26 F.4th at 1024. To the extent plaintiff objects to this testimony because  
8 Dr. Briggs espoused a different opinion during his deposition and/or because publicly  
9 available AWA compliance data shows that he is incorrect, the testimony may be  
10 impeached on cross-examination, but it is not inadmissible.  
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13 Plaintiff’s relevance objection is overruled. While the relevance of the rate of AWA  
14 compliance across all regulated facilities is marginal, it is not prejudicial to plaintiff, and it  
15 will help establish what “compliance” means in this context. Plaintiff has used and intends  
16 to use isolated instances of non-compliance to suggest that Olympic Game Farm is in  
17 violation of the Endangered Species Act and/or that its care is egregiously deficient and  
18 below reasonable expectations. Defendants will be permitted to rebut that inference  
19 through Dr. Briggs’s testimony.  
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## 22 **B. Interpretation of Necropsy Tissue Samples**

23 Dr. Briggs generated a report in response to Dr. Jennifer Ward’s opinions regarding  
24 the necropsies of the bear Good Mamma and the wolf Brutus. Plaintiff objects to Dr.  
25 Briggs’s “allegation that . . . the remains and tissue samples Dr. Ward reviewed were too  
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1 degraded or decayed to support her opinions.” Dkt. # 183. Problems with the quality of the  
2 tissue samples is not the thrust of Dr. Briggs’s criticism, however. Dr. Briggs notes that the  
3 various pathology reports related to Good Mamma and Brutus contain language indicating  
4 that the tissue samples had decayed to some extent, preventing the pathologists from  
5 determining Good Mamma’s cause of death and resulting in competing cause of death  
6 determinations for Brutus. Dkt. # 174 at 84-85. Nevertheless, Dr. Briggs generally  
7 approves of Dr. Ward’s cause of death analyses. *Id.* at 85.  
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10 Dr. Briggs’s disagreement with Dr. Ward arises from her opinions regarding the  
11 animals’ quality of life based on the inconclusive post-mortem findings. He again  
12 highlights Dr. Ward’s own acknowledgement of the difficulties caused by decay and  
13 degradation, identifies other potential causes of the observed conditions, and compares Dr.  
14 Ward’s quality of life claims against his own observations of the animals at Olympic Game  
15 Farm, discussions with staff, and a review of medical records. *Id.* at 85-86. There are  
16 ample facts and data to support his criticisms of Dr. Ward’s quality-of-life opinions, and  
17 the Court will not prevent Dr. Briggs from using his knowledge and experience as a basis  
18 for weighing the known facts and the identified uncertainties to assist the jury in evaluating  
19 those opinions. *See Primiano v. Cook*, 598 F.3d 555, 565–66 (9th Cir. 2010).  
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### 22 **C. Adequacy of Defendants’ Animal Care and Veterinarian Expenditures**

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24 Dr. Briggs generated a report in response to the opinions of Lynn Cuny, the  
25 president of an animal sanctuary in San Antonio, Texas, regarding the sufficiency of the  
26 resources Olympic Game Farm puts toward veterinary and animal care. Dr. Briggs opines,

1 based on his visits to Olympic Game Farm, review of medical records, discussions with  
2 staff, and a facility-appropriate evaluation of animal needs, that the resources devoted to  
3 the animals are adequate.<sup>2</sup> He criticizes Ms. Cuny's single-factor analysis "based solely on  
4 comparing the costs of running her facility in Texas with her perceived view of the  
5 amounts spent by the Olympic Game Farm on animal care and veterinary care,"  
6 identifying a number of flaws in the comparison. Dkt. # 174 at 40. Dr. Briggs takes issue  
7 with Ms. Cuny's attempt to use a line item in an accounting statement as a proxy for  
8 animal care. The jury will have to decide which expert has the better analysis.  
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#### 11 **D. Societal Value of Olympic Game Farm**

12 Dr. Briggs notes that Olympic Game Farm:

13 provides an important opportunity for the public to interact with a variety of  
14 species. In so doing, these animals leave a life-time impression of the joy,  
15 excitement, and appreciation of the magnificence of wildlife from the safety  
16 of the patron's automobile. The continued positive evolution and education  
17 that Olympic Game Farm provides is a unique opportunity to impact the  
lives and impressions of the young and old who visit the park.

18 Dkt. # 174 at 17-18. He later opines that "Olympic Game Farm's remoteness and drive  
19 through modality offers families and visitors the ability to interact with wildlife in a setting  
20 far different than that in a conventional zoo setting. It is that ability that is one of the  
21 calling cards that has allowed Olympic Game Farm to remain open, interesting, and viable  
22 to this day. Its uniqueness is in its very essence." *Id.* at 20. Dr. Briggs, with over 35 years'  
23 experience in animal handling facilities, is well-placed to opine regarding the uniqueness  
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26 <sup>2</sup> Plaintiff does not provide a record citation for the opinion it seeks to exclude, and the Court has not found an express statement by Dr. Briggs that "OGF's animal care expenditures are adequate." Dkt. # 183 at 3.

1 of the Olympic Game Farm experience and the anticipated benefits of bringing the public  
2 into close proximity with wildlife. He may also testify as to his personal observations of  
3 the joy and excitement engendered by these encounters at Olympic Game Farm. The only  
4 element of this testimony that is objectionable is his assertion that the joy and appreciation  
5 for wildlife he perceived will last a life-time or otherwise make a long-standing  
6 impression. Dr. Briggs shall refrain from offering testimony that is both outside his area of  
7 expertise and not based on his personal knowledge.  
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#### 10 **E. Animal Husbandry and Veterinary Care**

11 Plaintiff takes issue with Dr. Briggs's opinions regarding the adequacy of the  
12 veterinary care provided to Olympic Game Farm's animals, but does not identify the  
13 objectionable opinions. Dkt. # 158 at 6. In his report, Dr. Briggs states that "Olympic  
14 Game Farm has a veterinary program that is functional, adhered to, and ensures adequate  
15 medical and preventative treatment for animals." Dkt. # 174 at 22. When efforts fall short  
16 in some way and "deficiencies or teachable moments" arise, they are "addressed and  
17 resolved" in a "pattern of continuous improvement." *Id.* Plaintiff describes this testimony  
18 as "opining that all the vet care for OGF animals . . . was appropriate and adequate." Dkt.  
19 # 158 at 6. It then attacks the purported opinion as not based on a sound or accepted  
20 methodology because Dr. Briggs is "not a fan of anyone taking – making diagnosis  
21 without full information and not being there." Dkt. # 158-1 at 19. Plaintiff cites the  
22 expert's disagreements with Dr. Lisa Harrenstien regarding the care provided to a lynx  
23 with a fractured leg and with Dr. Valerie Johnson regarding the care provided a coyote  
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1 with a leg injury as proof that Dr. Briggs is being inconsistent, refusing to credit their  
2 criticisms of the care provided while himself opining that the treating veterinarians “took  
3 appropriate steps to treat the lynx’s leg fracture and abscess based on the information  
4 known at the time” (Dkt. # 158-1 at 20) and treated the coyote “with appropriate pain  
5 medications and antibiotics” (Dkt. # 174 at 52). Plaintiff argues that Dr. Briggs’s opinions  
6 are entirely results oriented, always favoring Olympic Game Farms, and are therefore  
7 unreliable.  
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10 Plaintiff’s objections rely on misstatements or misreadings of the record and are  
11 overruled. Dr. Briggs has not opined that all of the vet care provided by Olympic Game  
12 Farm was appropriate and adequate, although he may have concluded that certain types or  
13 instances of care meet that standard. His disagreement with plaintiff’s experts does not  
14 evidence faulty or results-driven methodology. With regards to the care provided to the  
15 lynx and coyote, his review of the records, conversations with staff, observation of the  
16 animals, education, experience, and/or knowledge led him to the conclusion that the care  
17 was appropriate. While he definitely faults Dr. Harrenstien and Dr. Johnson for second-  
18 guessing the treating veterinarian’s choices based on the benefit of hindsight, he  
19 specifically identifies deficits in their analyses. The jury will have to decide which expert  
20 has the better understanding of the context in which care was provided and the adequacy of  
21 that care.<sup>3</sup>  
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26 <sup>3</sup> Plaintiff’s discussion of the various opinions regarding the bilateral long bone fractures suffered by one or more  
wolf pups from a 2010 litter similarly and unpersuasively cherry picks statements to support its results-driven  
argument. The treating veterinarian, Dr. Sarah Owens, diagnosed moderate hyperparathyroidism caused by an



1 Plaintiff also seeks to exclude Dr. Briggs's opinions regarding (1) the minimum size  
 2 for a lion enclosure and (2) the level of discomfort manifested by an animal with a broken  
 3 tooth, arguing that the expert made contrary statements in the past. The purported  
 4 contradictions may provide an avenue for impeachment, but they do not make the  
 5 testimony inadmissible.  
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7 **F. Facts for Which the Expert Has No Personal Knowledge and Which are**  
 8 **Contradicted by Evidence in the Record**

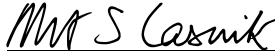
9 Plaintiff asserts that "[t]he remainder of Dr. Briggs's proffered testimony is  
 10 unhelpful because he is merely relaying hearsay" that is "often unreliable, contradicted by  
 11 sworn testimony and hard evidence, or misconstrued." Dkt. # 158 at 8. This argument is  
 12 abandoned in reply, for good reason. It is well-established that "experts may rely on  
 13 otherwise inadmissible out-of-court statements as a basis for forming an expert opinion if  
 14 they are of a kind that experts in the field normally rely upon." *Williams v. Illinois*, 567  
 15 U.S. 50, 88 (2012) (J. Breyer, concurring); *see* Fed. R. Ev. 703. "Because of his  
 16 professional background, knowledge, and experience, we should, in circumstances such as  
 17 these, leave to the expert the assessment of the reliability of the statements on which he  
 18 bases his expert opinion. . . . Years of experience teach the expert to separate the wheat  
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 23 abnormal diet. Dkt. # 158-1 at 34-35. While Dr. Briggs doubts that the poor quality radiographs on which this  
 24 diagnosis was based could support any determination regarding the etiology of the fractures, his main criticism is of  
 25 Dr. Johnson's subsequent determinations that the cause of the fractures was a meat-only diet, that the bone disease  
 26 was severe and life-threatening, and that if the pups survived they would suffer severe conformation deficits and  
 crippling lameness. Dkt. # 174 at 90-91. Dr. Briggs notes that all of the wolves from the 2010 litter survived, that he  
 has observed them all on multiple occasions, and that none appears to be abnormal, much less crippled. *Id.* at 91.  
 Again, Dr. Briggs's detailed and thoughtful analysis of the information available to him through the lens of his  
 admitted expertise in the field does not suggest a flawed methodology simply because he generally concludes that the  
 care provided by defendants was adequate and appropriate: it could simply be that that was, in fact, the case.

1 from the chaff and to use only those sources and kinds of information which are of a type  
2 reasonably relied upon by similar experts in arriving at sound opinions on the subject.”  
3 *U.S. v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975). A general objection to reliance on out-of-  
4 court statements for the development of expert opinions is unavailing.<sup>4</sup>  
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7 For all of the foregoing reasons, plaintiff’s *Daubert* motion is DENIED except that  
8 Dr. Briggs shall refrain from opining regarding the long-term emotional impacts arising  
9 from a visit to Olympic Game Farms.  
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12 Dated this 8th day of May, 2023.

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15 Robert S. Lasnik  
United States District Judge  
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26 <sup>4</sup> Plaintiff specifically objects to Dr. Briggs’s statement that an arctic fox in defendants’ care ate the day before he died. Dkt. # 174 at 53. If, as plaintiff seems to suspect, this assertion of fact is untrue and underlies one of Dr. Briggs’s opinions, it may make that point on cross-examination.